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**National War College**

**Fix the Law and Stop the War Powers Debate**

**Core Course 3 Essay**

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Course 3

Seminar I

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Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE <b>1995</b>		2. REPORT TYPE		3. DATES COVERED <b>00-00-1995 to 00-00-1995</b>	
4. TITLE AND SUBTITLE <b>Fix the Law and Stop the War Powers Debate</b>				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) <b>National War College, 300 5th Avenue, Fort Lesley J. McNair, Washington, DC, 20319-6000</b>				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT <b>Approved for public release; distribution unlimited</b>					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT <b>see report</b>					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES <b>15</b>	19a. NAME OF RESPONSIBLE PERSON
a. REPORT <b>unclassified</b>	b. ABSTRACT <b>unclassified</b>	c. THIS PAGE <b>unclassified</b>			

## *Introduction*

Senator Sam Nunn, in his homespun, but unequivocal, manner, said, "The War Powers Resolution is 'broke' and should be fixed "<sup>1</sup> In the 21 years since the resolution was enacted over President Nixon's veto, neither the Executive nor the Legislative branches have been happy with the law, a law which was intended "to encourage serious dialogue on war/peace issues between the branches of government "<sup>2</sup>

Why hasn't a law conceived for such an apparently noble purpose succeeded? Several factors have led many to agree with Sen. Nunn that the law should be changed, if not repealed outright. Among the factors cited are "presidential defiance, congressional irresolution, and judicial abstention."<sup>3</sup> The President views the resolution as an unwarranted infringement on his constitutionally mandated role as Commander-in-Chief. Congress, when offered the opportunity, has not developed the necessary consensus to directly challenge the President when it believes he has not fully complied with the law. Finally, the courts have consistently avoided taking sides on what has been viewed by the courts as a "political question "

As it stands now, the War Powers Resolution generates much discussion, results in reluctant and partial compliance by presidents, and is the source of great frustration for Congress. The three major thrusts of the resolution--consultation, reporting, and termination of participation by US forces--have all been thoroughly analyzed and criticized for their shortcomings. But since the overall intent of the law, in the words of a key sponsor of the resolution, the late Senator Jacob Javits, is "to provide the method by which the Congress and the President can render a collective judgment on whether to risk

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<sup>1</sup> Sam Nunn, "Summary Statement War Powers Act," press release, May 19, 1988

<sup>2</sup> Thomas M. Franck, "Rethinking War Powers: By Law or 'Thaumaturgic Invocation'?", The American Journal of International Law, 1989 770

<sup>3</sup> John Hart Ely, "Suppose Congress Wanted a War Powers Act That Worked," Columbia Law Review, November, 1988 1381

war,"<sup>4</sup> it would appear the consultation mechanisms in the law must be addressed first. Writing in 1985, Senator Mathias complained, "The resolution has been singularly unsuccessful in securing congressional participation in the decision to deploy troops there has been no meaningful consultation with Congress since the resolution was passed "<sup>5</sup>

But a model of a close consultative relationship on war powers between the Executive and the Congress already exists. As established by Congress in 1974, the President is required to consult with standing congressional intelligence oversight committees on all covert intelligence activities. Basing an amended war powers consultative process on the intelligence oversight model, an idea first proposed in 1988 by Senators Byrd, Nunn, Warner and Mitchell, offers an attractive solution to the recent war powers struggles between the Congress and the President.

### *Discussion*

Just as the War Powers Resolution was Congress' response to a perceived over-expansion of Executive power in committing the nation's armed forces to conflict, the 1974 Hughes-Ryan Amendment to the National Security Act of 1947 was Congress' reaction to Executive excesses in the field of covert actions. A "number of unseemly CIA activities came to light" in the early 1970s, such as plottings of political assassinations, the secret war in Laos, the destabilizations of several foreign governments, and the revelations of domestic intelligence gathering.<sup>6</sup> In 1974, Senator Howard Baker spoke out on Congress' lack of insight into intelligence activities when he said, "I do not think there is a man in the legislative part of the government who really knows what is going on in the

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<sup>4</sup> Jacob Javits, "War Powers Reconsidered," Foreign Affairs, Fall, 1985 134

<sup>5</sup> Charles McC Mathias, Jr., "The War Powers Resolution: Resolving the Dilemma," SAIS Review, Winter/Spring 1985 45

<sup>6</sup> Barry M. Blechman, The Politics of National Security (New York: Oxford University Press, 1990) 144-5

intelligence community "<sup>7</sup> To redress that lack of insight, the Hughes-Ryan Amendment required the President to certify in a finding to the appropriate committees of Congress that every covert action was important to the national security. The amendment also required that a description and the proposed scope of each action be reported to Congress.

Seeking to further strengthen congressional oversight, the Senate and the House established permanent committees on intelligence in 1976, and 1977, respectively. But since the Hughes-Ryan Amendment was not repealed or adjusted with the creation of the intelligence committees, the addition of two more committees meant covert actions were reported to a total of eight committees of Congress. This arrangement proved unwieldy, so Congress passed the Intelligence Oversight Act of 1980, which mandated that reports on covert activities be reported to the intelligence committees only. The act also required the President, except in "rare, extraordinary, and compelling circumstances,"<sup>8</sup> to give advance notice of covert intelligence activities to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House, and the majority and minority leaders of the Senate (sometimes referred to as the "gang of eight"). The full committees would receive a report in a timely fashion, along with an explanation of why notification to the full committees had to be delayed.<sup>9</sup> The practical effect of the 1980 act was that "Congress was made an equal partner with the Executive in intelligence policy and operations."<sup>10</sup> However, since the act did not explicitly require prior notification in every instance, and since the act did not mandate congressional *approval* of intelligence activities, Congress had not legislated veto power for itself. The

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<sup>7</sup> As quoted in Blechman, 145.

<sup>8</sup> House Report 96-730, "Intelligence Oversight Act of 1980," May 15, 1980. 8

<sup>9</sup> Blechman, 154.

<sup>10</sup> Harry Howe Ransom, "The Intelligence Function and the Constitution," Armed Forces and Society, Fall, 1987. 50

act "imposed an *informational* obligation on the Chief Executive but did not require that the President seek congressional consent "<sup>11</sup>

A draft of the most recent intelligence oversight legislation, the Intelligence Authorization Act of 1991--in addition to repealing the Hughes-Ryan Amendment to allow consolidation of all oversight-related legislation in one place in law--would have placed a strict requirement on the President to notify Congress within 48 hours of any covert activities. However, with President Bush's personal assurance of notification to Congress within a couple of days, "even in the most exceptional of circumstances," Congress acquiesced, removed the rigid 48 hour rule, and passed the legislation.<sup>12</sup>

To summarize the current congressional intelligence oversight process, covert intelligence activities must be reported to the intelligence committees in a timely manner except in very unusual circumstances, which require justification by the President. For particularly sensitive activities, Congress allows the President to choose to inform the gang of eight instead of the full committees. The key point, however, is that Congress has not chosen to provide itself with veto power over the President's proposed intelligence activities. "By providing that [oversight legislation] does 'not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity,' Congress explicitly disclaimed responsibility for deciding whether to authorize covert operations "<sup>13</sup>

But, unlike the unfortunate contentiousness between the Executive and the Congress on war powers, the intelligence oversight process has been well-received and generally well-executed--excepting Iran-Contra, of course. Arthur Hulnick, a CIA veteran of over 32 years, wrote, "Intelligence managers as well as Executive Branch officials have

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<sup>11</sup> Ransom, 51

<sup>12</sup> Charles G. Cogan, "Covert Action and Congressional Oversight: A Deontology," Studies in Conflict and Terrorism, April, 1993: 94

<sup>13</sup> Lori Fisler Damrosch, "Covert Operations," The American Journal of International Law, 1989: 799

come to value the congressional oversight system. Despite the inevitable problems, the public interest is apparently protected by this system. Congress is acting for the people in passing judgment on the intelligence policy created in the National Security Council."<sup>14</sup>

Clearly, strengths of the intelligence oversight legislation are 1) the definitive requirement of the Executive to consult with the Congress on covert activities, although congressional approval is explicitly not required; and 2) the unambiguous language in the law on who in Congress is to be consulted. With respect to war powers, however, the consultation requirements stated in section three of the War Powers Resolution are much more vague.

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.<sup>15</sup>

Although the overall spirit and intent of the resolution seems clear enough, a "letter of the law" reading reveals ambiguities which have been exploited by presidents to avoid total compliance with the law. Unlike the intelligence oversight legislation, the resolution does not specify who should be consulted. Similar to the intelligence laws, the resolution does require the President to consult with Congress on war powers, however, the phrase "in every possible instance" allows differing interpretations, and the law is silent on the issue of whether Congress' *approval* is needed. "Because the resolution makes consultation optional [due to ambiguous wording] and fails to create a system for consultation or define the meaning of acceptable consultation, the law does little to change the war powers relationship in that respect."<sup>16</sup> Interestingly, whereas Congress has passed

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<sup>14</sup> Arthur S. Hulnick, "Determining U.S. Intelligence Policy," International Journal of Intelligence and Counterintelligence, Summer 1989, 221.

<sup>15</sup> Public Law 93-148, "The War Powers Resolution," November 7, 1973.

<sup>16</sup> Daniel Paul Franklin, "War Powers in the Modern Context," Congress and the

three different pieces of legislation to fine-tune the intelligence oversight mechanisms, and thereby clarified congressional intent, the War Powers Resolution has not been amended since enactment in 1973--despite much discussion of proposed amendments

From the Executive perspective, former President Ford identified several concerns on the requirement to consult with Congress on war powers 1) members are so busy there is no time to brief them, 2) it takes time to develop a consensus among Congressmen, 3) the risk of disclosure of sensitive information is high, 4) achieving consensus with a handful of leaders may not mean the entire membership would be in agreement, especially as individual members become increasingly fractious, and 5) members believe they have little to gain and much to lose, since the President will get the credit if things go well, while Congress will lose its right to criticize if the operation is not a success.<sup>17</sup>

In light of the existing--and apparently well-accepted--intelligence oversight process, President Ford's arguments warrant closer scrutiny Congress, through the intelligence committees, has allocated adequate time to oversee covert intelligence activities, and although details are not publicly available, it seems reasonable to assume that covert activities are conducted more often than uses of armed forces are contemplated Additionally, incidents of disclosure of sensitive information on covert activities by the Congress have been almost nonexistent, although fears that Congress would leak information date back to the beginning of American history During the Second Continental Congress, only five members of Congress sat on the Committee of Secret Correspondence When one of the members, a certain Benjamin Franklin, learned that the French would covertly supply arms, munitions and money to the revolution, he said to his committee colleague Robert Morris, "It is our duty to keep it a secret, even

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Presidency, Spring 1987 83-4

<sup>17</sup> Barbara Hinkson Craig, "The Power to Make War Congress' Search For an Effective Role," Journal of Policy Analysis and Management, Spring 1982 321



from Congress We find, by fatal experience, the Congress consists of too many members to keep secrets "<sup>18</sup> In the modern era, however, particularly as it relates to intelligence activities, "fears that information would leak, either from members or staff, have proved to be largely groundless "<sup>19</sup>

President Ford's point on the difficulty of seeking consensus is certainly true But rather than being viewed as a weakness, difficulty in reaching agreement to commit to war is just what the framers of the constitution had in mind James Madison, writing in 1798 to his friend Thomas Jefferson, said, "The Constitution supposes what the history of all governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it It has accordingly with studied care vested the question of war in the Legislative [branch] "<sup>20</sup> James Wilson, a Pennsylvania delegate to the Constitutional Convention, wrote, "It will not be in the power of a single man to invoke us such distress for the important power of declaring war is vested in the legislature at large This system will not hurry us into war, it is calculated against it "<sup>21</sup>

An early draft of the Constitution gave Congress the power to "make war," but Madison's proposed change was adopted to give Congress the power to "declare war " While this change may seem innocuous, Madison wrote that it is necessary to carefully distinguish the power that a Commander in Chief has to "conduct a war" from the power to decide "whether a war ought to be commenced, continued, or concluded "<sup>22</sup> From his review of the historical record, Stanford Law Professor John Hart Ely further clarified why the wording was changed "This change was made for two reasons--first, to make

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<sup>18</sup> Cogan, 93

<sup>19</sup> Hulnick, 221

<sup>20</sup> As quoted by Dale Bumpers, "Congress Essential Ingredient in Sound Foreign Policy," SAIS Review, Winter/Spring 1985 54

<sup>21</sup> As quoted by James A. Nathan, "Curbing the Distress of War An Outline For a War Powers Resolution That Works," Polity, Summer 1991 627

<sup>22</sup> Ely 1387

clear that once hostilities were congressionally authorized, the President, as 'Commander in Chief,' would assume tactical control (without constant congressional interference) of the way they were conducted, and second, to preserve to the President the power, without advance congressional authorization, to respond defensively to 'repel sudden attacks '"<sup>23</sup> Particularly with the end of the Cold War, sudden attacks seem remote in the modern era. A more modern, functional interpretation of the President's constitutional powers to repel attacks, according to Ely, "should probably permit him to take any military action necessary to preserve our national security when there is not time to consult Congress--but subject always to the core command underlying the constitutional accommodation, which certainly is not obsolete, that he come to Congress for approval as soon as possible and terminate military action in the event such approval is not forthcoming "<sup>24</sup>

It seems clear the framers of the constitution intended that the Congress have the power to decide when to go to war, except in the event quick reaction was necessary to preserve national security--and even then, the President should seek Congressional approval for continuation of his chosen course of action. Former Senator Dale Bumpers wrote, "During the past few decades an unfortunate but natural tendency has been for the Executive Branch to interpret the President's role as Commander in Chief as a kind of constitutional blank check "<sup>25</sup> Many join Senator Bumpers in rejecting the view that this situation should continue unfettered. Colgate Professor Daniel Paul Franklin believes Congress may have overstepped its bounds in allowing the Executive any leeway in exercising war powers. "Since the Constitution specifically places the war power in the hands of the legislative branch, Congress has no right to delegate away its war power in

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<sup>23</sup> Ely, 1387-8

<sup>24</sup> Ely, 1388

<sup>25</sup> Bumpers, 53

the first place. Therefore, the President's exercises of the war powers (at least in terms of the initiation of conflict) are 'provisional,' subject to the ultimate approval of Congress."<sup>26</sup>

The War Powers Resolution, then, was Congress' "somewhat awkward effort," in the words of Senator Mathias,<sup>27</sup> to partially wrest back its constitutional war powers which were willingly, but only tacitly, relegated to the Executive since President Truman's decision to defend South Korea.<sup>28</sup> But without definitive consultative requirements, and without mandating constitutionally required congressional approval *before* the Executive commits armed forces, "Congress is now left with a law that, at heart, merely invites it to legislate case by case to prohibit an unauthorized Executive use of military force. A law that does no more than that does nothing."<sup>29</sup>

"For consultation to be regarded as a congressional prerogative, rather than a privilege occasionally extended to it by the Executive, the circumstances to make consultation possible must be created."<sup>30</sup> In an attempt to create those circumstances, and to clarify and strengthen the resolution, Senators Byrd, Nunn, Warner, and Mitchell offered a 1988 amendment to the law that would require the President to consult "in all possible instances" with a small group, consisting of the Speaker of the House, the president pro tempore of the Senate, and the majority and minority leaders of each House of Congress. If a majority of this smaller group so determined, the President also would be required to consult with a larger "permanent consultative group, composed of the majority and minority leaders of both Houses and the chairmen and ranking members of the Foreign Affairs, Foreign Relations, Armed Services, and Intelligence committees [The Amendment] would require the White House to consult regularly with the group, not

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<sup>26</sup> Franklin, 89

<sup>27</sup> Mathias, 43

<sup>28</sup> Ely, 1391

<sup>29</sup> Franck, 769

<sup>30</sup> Craig, 326

only hours before or hours after deciding to deploy troops "<sup>31</sup> Such an arrangement, patterned after the intelligence oversight process, would prove "surely a step in the right direction, as presidents since 1973 have complained that they were never sure exactly with whom they were supposed to consult "<sup>32</sup>

The Byrd, Nunn, Warner, Mitchell Amendment, which was referred to the Senate Foreign Relations Committee for quick action, died without further action in the 100th Congress and it has not resurfaced. But consultative mechanisms proposed in the amendment would prove invaluable in addressing the shortcomings of the War Powers Resolution. To prevent the continuation of ambiguities in the 1973 resolution, however, the Byrd, Nunn, Warner, Mitchell Amendment framework needs adjustment. "The requirement for consultations 'in every possible instance' should be strengthened and tightened. consultations could be required in every instance, with the sole exclusions of those cases in which the United States itself, or U S military forces, or U S citizens abroad were facing actual or imminent attack "<sup>33</sup> Also, the amendment did not clarify the intended outcome or definition of consultations. The question of whether consultations should include advice and consent or merely consist of notifications is not answered. As previously discussed, Congress has the constitutional basis to require that the Executive seek congressional approval *prior* to committing U S forces to battle.

The difficulty of having an exclusive group, similar to the intelligence committees, act as the consultative subset of Congress might prove difficult to sell, particularly in an increasingly fractious Congress--another of President Ford's objections. "Making information available to some members and not others appears to transgress the theory of member equality. Experience seems to indicate, however, that a failure to achieve a centralized mechanism for receiving sensitive information would mean that no one in

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<sup>31</sup> Anonymous. "Broken Clock," The New Republic, September 10 & 17, 1990. 12

<sup>32</sup> Ely, 1383

<sup>33</sup> Blechman, 197

Congress would be able to participate in the decision to make war "<sup>34</sup> Congress and the Executive should be willing to compromise in developing a consultative process to ensure the larger goal of meaningful consultations is achieved. A standing consultative body within Congress should prove to be a confidence-building measure for both branches of government.

In contradistinction to the opinion of the Executive, as demonstrated by President Ford's thoughts and as shown by common practice since the Korean Conflict, "The objective of consultation, is to provide Congress with the fullest possible basis for understanding the problem without compromising its opportunity to act as an independent force. The President must be willing fully to reveal his hand before he has played it "<sup>35</sup> Just as Congress has mandated that covert actions must be briefed to Congress--and in almost all cases, prior to the initiation of the activity--the Executive should recognize the value, both domestically and internationally, of prior consultation with the elected representatives of the people. "[The President's] ability to act decisively in the world community would be greatly enhanced if it were known to be based on the consent of Congress "<sup>36</sup>

### *Conclusion*

"Perhaps not since the Volstead Act ushered in the Prohibition Era has a federal law been talked about more and respected less than the War Powers Resolution of 1973," said an editorial in the San Francisco Banner Daily Journal <sup>37</sup> Hyperbole, perhaps, but there is no doubt that the war powers process needs surgery. Ely believes the "tale of the War Powers Resolution of 1973 has been a tale of congressional spinelessness. There has to come a point where Congress will want to stop looking ineffectual "<sup>38</sup>

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<sup>34</sup> Craig, 327

<sup>35</sup> Craig, 325

<sup>36</sup> Craig, 325

<sup>37</sup> As quoted by Ely, 1379

<sup>38</sup> Ely, 1419

What works so well for the intelligence community should work in war powers as well, and instituting an "intelligence-like" consultative process of a standing committee should be welcomed by the President. "In the end, the Executive reluctance to share power where the Constitution mandates [at the very minimum] co-determination seems at best both ungracious and politically ill-advised. The Executive, in merely informing Congress without conceding the right of Congress to offer its advice, forsakes the practical requirement of securing domestic support for an action."<sup>39</sup>

Cooperation between branches of government is the constitutional system's "iron demand on the President and Congress."<sup>40</sup> "Both branches must develop a will to share power, a tendency rare in those usually able to persevere alone."<sup>41</sup> The collective judgment of Congress and the Executive serve the nation well in the area of covert intelligence activities, and it's time to apply a similar mechanism to war powers. "Singly, either the President or Congress can fall into bad errors. So they can together too, but that is somewhat less likely, and in any event, together they are all we've got."<sup>42</sup>

Sooner, rather than later, Congress must act to fix what Senator Nunn, along with a host of others, say is "broke."

There will come again a time to consider new war powers legislation before events close us in. If we wait for another trial at arms, we risk finding Congress again transfixed by wicked adversaries, appeals to unity, and concern for the morale of our troops. If we wait for the next time, the matter of war and peace will again be left to the President, to his agenda, to his wisdom, and to his luck.<sup>43</sup>

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<sup>39</sup> Nathan, 617

<sup>40</sup> Taylor Reveley, as quoted by Franck, 776

<sup>41</sup> Franck, 776

<sup>42</sup> Alex Bickel as quoted by Ely, 1421

<sup>43</sup> Nathan, 628

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